Chicago-Kent Law Review

Volume 56 | Issue 2 Article 10

June 1980

Constitutionality of an Employer's Duty to Accommodate Religious Beliefs and Practices

James L. Beard

THE CONSTITUTIONALITY OF AN EMPLOYER'S DUTY TO ACCOMMODATE RELIGIOUS BELIEFS AND PRACTICES

In 1972, Congress enacted section 701(j) of the Equal Opportunity Act[1] which under certain circumstances requires employers to modify facially neutral work policies when those policies conflict with an employee's religious belief or practice. This requirement, which is commonly referred to as the reasonable accommodation rule, can be utilized by religious employees so as to ensure that they do not work on their Sabbath. For example, an employee may be regularly scheduled to work on Saturdays, his Sabbath. Under the reasonable accommodation rule, the employer is required to attempt to accommodate the employee's wishes if the employee does not want to work on his Sabbath. The rule requires the employer to accommodate the religious practices of his employees unless such accommodation results in undue hardship.

The establishment clause of the first amendment provides that: "Congress shall make no law respecting the establishment of religion."[2] Under the current United States Supreme Court analysis, the establishment clause requires that when government action touches on a religious sphere it must reflect a clearly secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must avoid excessive entanglement with religion.[3]

The thesis of this note is that when Congress placed an affirmative obligation upon employers to accommodate religious practitioners, it contravened the establishment clause. The note first discusses the statutory development of the reasonable accommodation rule. Then the note discusses the United States Supreme Court's treatment of the accommodation requirement. Finally, the constitutionality of the reasonable accommodation rule under the establishment clause will be discussed.

STATUTORY EVOLUTION OF THE REASONABLE ACCOMMODATION RULE

The ban on religious discrimination originated in title VII of the

1. 42 U.S.C. § 2000e(j) (1976).
2. U.S. CONST. amend. I.
3. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

Civil Rights Act of 1964.[4] Title VII bans discrimination in employment on the basis of certain prohibited criteria by providing that:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[5]

Much of the congressional debate that led to the enactment of title VII focused primarily on the pervasive history of racial discrimination in the United States and the debilitating effects of such discrimination on employment.[6] Perhaps in recognition of the fact that discrimination based on certain other characteristics was equally destructive, Congress included without much debate other forms of prohibited classifications.[7] Among the other prohibited employment practices was religious discrimination.

It should not be surprising that religion was included in title VII as a prohibited criterion for employment decision-making. Religious freedom has always been an important concept in American history, as evidenced by the religion clauses of the first amendment.[8] Furthermore, title VII was patterned in part after state fair employment practices legislation which typically included religion as a prohibited classifying factor.[9] Thus, Congress remained true to the policy of religious liberty by making religious discrimination an unlawful employment practice.

The original thrust of title VII was a negative mandate for employers. The employer was required to *refrain from* utilizing race, color, religion, sex, or national origin as a criterion for granting or withholding employment opportunities. In 1966, however, the Equal Employment Opportunity Commission departed from this negative mandate in the area of religious discrimination.

The 1966 Equal Employment Opportunity Commission's guide-

4. 42 U.S.C. §§ 2000e to 2000e-17 (1976) [hereinafter referred to in text and footnotes as title VII].

5. *Id.* § 2000e-2. The constitutional basis for title VII was derived from Congress' power to regulate commerce. 100 CONG. REC. 1528 (1964) (remarks of Rep. Celler).

6. *See, e.g.*, 110 CONG. REC. 11517 (1964); 109 CONG. REC. 3245-49 (1964).

7. Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 600 (1971) [hereinafter referred to as Edwards & Kaplan]; *see also* 110 CONG. REC. 1528-29 (1964).

8. U.S. CONST. amend. I provides, in pertinent part:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . .

9. Edwards & Kaplan, *supra* note 7, at 600.

lines on religious discrimination[10] stipulated that private employers not only must abstain from using religion as a decision-making factor, but also had an affirmative duty "to accommodate to the religious needs of employees . . . where such accommodation can be made without *serious inconvenience* to the conduct of business."[11] Apparently, the EEOC decided placing an affirmative obligation on the employer was necessary to effect the modification of neutral employment policies when a conflict arose between an employee's religious practices and uniform work rules, unless such preference or change in employment policies resulted in "serious inconvenience" to the employer's business.

In 1967, the EEOC promulgated a new set of guidelines[12] which placed a greater burden on private employers. The 1967 guidelines compelled an employer "to make reasonable accommodations to the religious needs of employees or prospective employees where such accommodation can be made without *undue hardship* on the conduct of the employer's business."[13] The guidelines also placed the burden on the employer to prove that the proposed accommodation would result in undue hardship.[14] Essentially, these guidelines went beyond merely augmenting the affirmative obligation previously placed on the employer by the 1966 guidelines and instead equated the failure to accommodate with religious discrimination.[15]

The reasonable accommodation requirement may have evolved from the recognition that facially neutral employment policies can have a disparate impact upon protected classes. In *Griggs v. Duke Power Co.*,[16] the United States Supreme Court held that benign employment policies can violate title VII if they are discriminatory in effect. Arguably, the reasonable accommodation/undue hardship requirement was nothing more than a codification of the "business necessity"[17] test

10. 29 C.F.R. § 1605 (1966). The Equal Employment Opportunity Commission is hereinafter referred to as the EEOC.

11. 29 C.F.R. § 1605.1(a)(2) (1966) (emphasis added).

12. *Id.* § 1605 (1967). These guidelines were incorporated into the 1972 amendments to title VII.

13. *Id.* § 1605.1(b) (1979) (emphasis added).

14. *Id.* § 1605.1(c) provides: "Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to religious needs of the employee unreasonable."

15. *Id.*

16. 401 U.S. 424 (1971). In *Griggs*, the Supreme Court held that facially neutral employment policies will be deemed to violate title VII if the employee can show that the policies had a disparate impact upon a protected class. The employer can justify such policies by a showing of "business necessity." *Id.* at 431. Thus, the employment policy must be shown to further some legitimate business purpose.

17. *Id.*

enunciated in *Griggs*. This analogy, however, probably proves too much because the "undue hardship" mandate demands more than just a showing of job-relatedness, which is the touchstone of the business necessity inquiry.[18] For instance, religious beliefs which dictate specific dress and grooming habits are conceivably protected under the reasonable accommodation analysis.[19] In contradistinction, some courts have found that dress and grooming modes are not protected under the sex discrimination prohibition in title VII.[20] In addition, the 1967 guidelines equated failure to accommodate with religious discrimination by shifting the burden on the employer to prove that accommodation would be impossible without undue hardship on the employer's business.[21]

This shift of the burden of proof is entirely different from a discrimination claim which alleges that a facially neutral employment policy has a disparate impact upon a protected class. For example, in a claim based on other prohibited forms of discrimination, the employee must first allege and prove a prima facie case.[22] Then, the burden shifts to the employer to justify its actions by some legitimate business necessity.[23] However, in religious discrimination cases under the 1967 guidelines, once the employee alleged that an otherwise neutral employment policy interfered with the employee's religious practices, the burden was on the employer to show that accommodation of the needs of a religious employee would result in undue hardship.[24] Thus, once an employment-religious conflict was shown, the employer was presumed, albeit rebuttably, to have committed an unfair employment practice. This presumption was rebuttable by a showing of undue hardship on the employer's business operations.

18. *Id.*

19. *See* EEOC v. Rollins, Inc., 8 FEP 492 (N.D. Ga. 1974), in which the court refused to hold, as a matter of law, that an employer's refusal to allow a Black Muslim employee to wear certain religious clothing may not amount to religious discrimination under title VII.

20. *See, e.g.*, Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973) (different grooming standards for men and women did not constitute sex discrimination). *But see* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3602 (U.S. March 18, 1980) (requiring women but not men to wear uniforms when both groups perform the same functions constituted sex discrimination).

21. 29 C.F.R. § 1605.1(c) (1978).

22. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which involved racial discrimination in hiring. The Court held that the plaintiff carries the initial burden by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. The Court felt that this analysis was adaptable to other fact patterns. *Id.* at 802 n.13.

23. *Id.* at 798. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

24. 29 C.F.R. § 1605.1(c) (1979).

The 1967 guidelines were tested in *Dewey v. Reynolds Metals Co.*[25] In *Dewey*, after an employer instituted a seven-day work week, an employee was discharged after he refused because of his religious beliefs to work on Sunday or to find a replacement. The district court held for the employee, finding that the employer had not shown that any accommodation would result in "undue hardship."[26] The United States Court of Appeals for the Sixth Circuit reversed, finding that the employer's attempt at accommodation was sufficient.[27] However, the court went on to question the EEOC's statutory authority to place upon the employer an affirmative obligation to accommodate employees' religious practices.[28] Even if the EEOC had such statutory authority, the Sixth Circuit felt that an expansive interpretation of the duty to accommodate "would raise grave constitutional questions of violations of the Establishment Clause of the First Amendment."[29]

Congress responded to *Dewey* in 1972 by enacting section 701(j) of the Equal Employment Opportunity Act which incorporated the affirmative duty to accommodate into title VII by providing that:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless the employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance without undue hardship on the conduct of the employer's business.[30]

The first half of section 701(j) broadly construes the meaning of religion in employment contexts.[31] By enacting section 701(j), Congress intended to protect both subjective beliefs as well as the objective manifestations of those beliefs. The second half of section 701(j) incorporates the 1967 guidelines concerning accommodation of the religious practitioner. Thus, Congress placed an affirmative obligation on employers—absent undue hardship—to adjust work policies when such policies conflicted with the religious practices of employees. The net result of this legislation is that religious employees were to be treated differently from other employees. Thus, Congress directed that employers are obligated to give employment preferences to religious ob-

25. 429 F.2d 324 (6th Cir. 1970), *aff'd mem.*, 402 U.S. 950 (1971).

26. 300 F. Supp. 709 (W.D. Mich. 1969).

27. 429 F.2d at 331. The employer attempted to accommodate the employee by allowing him to find a replacement for the days he would not work.

28. *Id.* at 331 n.1.

29. *Id.* at 334.

30. 42 U.S.C. § 2000e(j) (1976).

31. The reason for the broad definition of religion is that the first amendment's free exercise clause probably precludes a narrower definition of religion. *See, e.g.*, Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1969).

servers, unless such preference results in undue hardship. An example of such preference is Fridays off for the Sabbath observer.

Section 701(j) was introduced in Congress by Senator Randolf from West Virginia.[32] Senator Randolf was primarily concerned with the Sabbatarian observer. In that regard, he stated:

> I am sure that my colleges [*sic*] are well aware that there are several religious bodies . . . not large in membership, but with certain strong convictions, that believe that there should be steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than Sunday. On this day of worship work is prohibited whether that day fall on Friday, Saturday, or Sunday.[33]

Senator Randolf was also concerned about employment policies that conflict with Sabbatarian practices and the impact of this conflict on the employee's religious organization. The senator stated:

> [T]here has been a partial refusal at times on the part of employers to hire or continue to hire in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been . . . a dwindling of the memberships of some . . . religious organizations. . . . My own pastor . . . has expressed his concern and distress that there are certain faiths that are having a very difficult time . . . [because of] possible inability of employers on some occasions to fit the requirements of the faith of some of their workers.[34]

Senator Randolf also stated that the Civil Rights Act of 1964 was intended "to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments."[35] He also saw no constitutional difficulties with section 701(j), noting that the reasonable accommodation/undue hardship standard promotes the free exercise of religion.

Thus, according to Senator Randolf, whose testimony dominated the congressional discussion, the reasons for the reasonable accommodation rule were: (1) that some religions organizations' memberships are decreasing due to conflicts between employment policies and the respective Sabbaths of those religions; (2) that the Civil Rights Act ban on religious discrimination, at least in part, arose from the idea that the constitutional guarantee of religious liberty should be extended to private employment contexts; and (3) that these goals can be accomplished by regulating private conduct to the extent of compelling accommodation of a religious employee's beliefs or practices.

32. 118 CONG. REC. 705 (1974).
33. *Id.*
34. *Id.*
35. *Id.*

THE UNITED STATES SUPREME COURT'S ANALYSIS OF THE REASONABLE ACCOMMODATION RULE

Although the duty to accommodate an employee's religious practices and beliefs first appeared in the 1966 EEOC guidelines on religious discrimination,[36] the scope of the employer's obligation remained unsettled. In three cases, the United States Supreme Court was confronted with the issue as to how far an employer must go before accommodation becomes an undue hardship. In the first two cases, an equally divided Court summarily affirmed the appellate court decision without an opinion.[37] In the third case, *Trans World Airlines v. Hardison*,[38] the United States Supreme Court issued its opinion as to the scope of the employer's duty.

In *Dewey v. Reynolds Metals*,[39] Dewey, the employee, was discharged because of a conflict between his Sabbath and the employer's working policy. Dewey felt that working on his Sabbath or finding a replacement were both sins.[40] The employer offered no more accommodation than allowing Dewey to find a replacement to fill his position on his Sabbath. Dewey urged the court to construe the accommodation requirement so as to allow him to observe his Sabbath and still retain his job. The United States Court of Appeals for the Sixth Circuit rejected this argument and reasoned that to require the employer to do more than allowing the religious practitioner to obtain a replacement employee, would force the employer to distribute employment opportunities on an unequal basis.[41] The Sixth Circuit held that such a result was prohibited by title VII.[42]

The United States Supreme Court granted certiorari on *Dewey v.*

36. *See* text accompanying notes 7-8 *supra*.

37. Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd mem.*, 429 U.S. 65 (1976); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd mem.*, 402 U.S. 689 (1971).

38. 432 U.S. 63 (1977).

39. 429 F.2d 324 (6th Cir. 1970), *aff'd mem.*, 402 U.S. 689 (1971).

40. 429 F.2d at 331.

41. *Id.* at 330.

42. The Sixth Circuit stated:

> The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union and his employer, which provisions were equally applicable to all employees. . . .
>
> To accede to Dewey's demands would require Reynolds to *discriminate* against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among employees, and could create chaotic personnel problems and lead to grievances and additional arbitrations.

Id. at 330-31 (emphasis added).

Reynolds Metals Co.,[43] but was unable to reach agreement as to the meaning of the reasonable accommodation rule. An equally divided Court affirmed the Sixth Circuit's holding.[44]

Cummins v. Parker Seal Co.,[45] like *Reynolds Metals*, involved a claim by a Sabbatarian observer that his religious practices conflicted with otherwise neutral work policies. The employer attempted to find a replacement employee; however, this plan proved unworkable. Cummins, a plant supervisor, could only be replaced by other plant supervisors, and that resulted in a considerable imbalance in the work schedule. During one period, Cummins worked forty hours per week, while the remaining supervisors were forced to work seventy hours per week.[46] This imbalance caused considerable discontent among the other supervisors and, after receiving numerous complaints, the employer discharged Cummins.

The United States Court of Appeals for the Sixth Circuit held that the employer had not satisfied its obligation to accommodate the religious practices of its employee. The court stated that "[i]f employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under [the reasonable accommodation rule] such grumbling must yield to the single employee's right to practice his religion."[47] Moreover, the court found that only if morale problems became sufficiently serious to cause "chaotic personnel problems,"[48] could the employer properly discharge the Sabbath observer. The United States Supreme Court granted certiorari on *Cummins v. Parker Seal Co.*[49] and an equally divided Court affirmed the appellate court's decision.[50]

The third case reaching the United States Supreme Court involving the conflict between a religious employee's Sabbath and an employer's work policy was *Trans World Airlines v. Hardison*.[51] The Sabbath observer in *Trans World*, Hardison, was employed by Trans World Airlines[52] in a department that operated twenty-four hours a day.[53] The company and the International Association of Machinists &

43. 400 U.S. 1008 (1971).
44. 402 U.S. 689 (1971).
45. 516 F.2d 544 (6th Cir. 1975), *aff'd mem.*, 429 U.S. 65 (1976).
46. 516 F.2d at 548.
47. *Id.* at 550.
48. *Id.*
49. 424 U.S. 942 (1975).
50. 429 U.S. 65 (1976).
51. 432 U.S. 63 (1977).
52. Hereinafter referred to as TWA or the company.
53. 432 U.S. at 66.

Aerospace Workers had entered into a collective bargaining agreement which provided for a seniority system whereby the most senior employees had first choice for job and shift assignments as they became available, while the most junior employees chose from the remaining job and shift assignments.[54]

Hardison's religions beliefs prohibited him from working on Saturdays, his Sabbath. Initially, it was possible to accommodate Hardison's religious beliefs because on his particular job he had sufficient seniority to observe his Sabbath.[55] However, when Hardison sought and was subsequently transferred to a new job where he had lower comparative seniority, he could not avoid schedules which infringed upon his Sabbath observance.[56] TWA offered to permit the union to change its work assignments, but the union was unwilling to violate the seniority system and Hardison had insufficient seniority to bid for a shift having Saturdays off. TWA rejected a proposal that Hardison work only four days a week because it would impair critical functions in the airline's maintenance operations.[57] TWA subsequently arrived at the conclusion that no accommodation was available and discharged Hardison for refusal to work on Saturdays.

Hardison instituted an action based on the reasonable accommodation requirements contained in both the 1967 EEOC guidelines and the 1972 amendments to title VII. The district court ruled in favor of both the union and TWA, finding that the union could not be compelled to ignore a valid seniority system and that TWA had satisfied its obligation to accommodate the employee's religious beliefs. The United States Court of Appeals for the Sixth Circuit affirmed the judgment for the union, but reversed as to TWA.[58] The Sixth Circuit reasoned that TWA could have satisfied its obligation without undue hardship by: (1) permitting Hardison to work a four-day week and replacing Hardison by a supervisor or another employee on duty elsewhere, even though this would cause shop functions to suffer;[59] (2) filling Hardison's Saturday shift from other available personnel, although this would have required TWA to bear the cost of premium overtime pay;[60] or (3) arranging a "swap" between Hardison and another employee for another shift or for the Sabbath days, although this

54. *Id.* at 67.
55. *Id.* at 68.
56. *Id.*
57. *Id.* at 76.
58. 516 F.2d 544 (6th Cir. 1975).
59. 432 U.S. at 76.
60. *Id.*

would have been a breach of the collective bargaining agreement.[61]

Both defendants challenged the Sixth Circuit's decision on statutory and constitutional grounds. TWA and the union alleged that they had fulfilled their statutory obligation to accommodate religious beliefs.[62] Moreover, they argued that any further accommodation would be inconsistent with the first amendment's establishment clause.[63] In a seven to two decision, the United States Supreme Court agreed with defendants' statutory argument and found that both TWA and the union had satisfied their obligation to the employee.[64] Thus, the Court never reached the constitutional issue.[65]

The thrust of the union's and TWA's challenge was that collective bargaining agreements further the basic policy of industrial stability in the United States. Therefore, seniority agreements, which are an essential stabilizing factor in a collective bargaining agreement, should not be breached to accommodate religious beliefs which conflict with the seniority system. Also, the defendants challenged the scope of the duty to accommodate by arguing that their attempts to conform to the employee's demands were sufficient.

The United States Supreme Court weighed these arguments against Hardison's assertion that the express will of Congress required employers to accede to employees' religious demands absent a finding of undue hardship. The Court struck the balance in favor of employers and unions. The Court acknowledged that public policy favors industrial stability through collective bargaining and indicated that the seniority system itself represents a significant accommodation to both the religious and secular needs of employees.[66] In this regard, the Court stated that "the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off."[67] The Court concluded that, absent a dis-

61. *Id.* at 76-77.
62. *Id.* at 70.
63. *Id.*
64. *Id.* at 77.
65. In Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) and Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976), the Court was faced with a constitutional challenge to the reasonable accommodation rule, along with a question of statutory interpretation. Both times, the Court granted certiorari, but was unable to reach agreement on the issues. Perhaps this shows a reluctance by the Court to confront establishment clause or free exercise issues in the employment area. For example, in NLRB v. Catholic Bishop of Chicago, 434 U.S. 1061 (1978), the Court limited the jurisdiction of the NLRB to secular institutions arguably because of the grave constitutional issues that would have been engendered by a contrary holding.
66. 432 U.S. at 78.
67. *Id.*

criminatory purpose, a bona fide seniority system should not be violated in order to accommodate an employee's religious practices and that title VII does not require employers to deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious practices of some other employees.[68] The Court held that to require an employer to bear more than a *de minimis* cost in accommodating religious practices is equivalent to undue hardship.[69] Finally, the Court held that section 701(j) equates an employer's failure to accommodate with an unlawful employment practice.[70]

As the dissenting opinion in *Trans World* emphatically stated, the majority's decision may well have struck a "fatal blow to all efforts under Title VII to accommodate work requirements to religious practices."[71] The *Trans World* decision does severely limit the scope of an employer's duty to accommodate. However, it appears that the outcome in the case was required by the establishment clause of the Constitution.

The *Trans World* holding rests upon two basic policies: (1) that collective bargaining, and in particular a negotiated seniority system, should not be disturbed, absent a showing of discriminatory purpose, and (2) that regulating private conduct to the extent of mandating preferential treatment on the basis of religion raises serious constitutional questions. For example, if the Court had construed the statute broadly so as to have required accommodation, then the Court would have confronted the question of whether or not accommodation of religious practices contravened the first amendment. Instead, the Court narrowly construed the statute to avoid this dilemma and followed the general proposition that a statute should not be construed to impose this duty unless such interpretation is unavoidable.

By upholding TWA's seniority system, the Court reaffirmed the long-recognized policy of achieving industrial stability through collective bargaining. Support for this policy is found in title VII's statutory scheme. Section 703(h) provides that:

> It shall not be an unlawful employment practice for an employer to . . . differentiate terms, conditions or privileges of employment pursuant to a bona fide seniority system . . . provided that such differences are not a result of an intention to discriminate because . . . of

68. *Id.* at 81.
69. *Id.* at 84.
70. *Id.* at 74.
71. *Id.* at 86 (Brennan and Marshall, JJ., dissenting).

religion.[72]

Thus, the Court furthered the stated goals of our national labor policy by refusing to disturb the seniority system. However, the Court had been willing to order the bypass of seniority systems in some previous title VII actions. For example, in *Franks v. Bowman Transportation Co.*,[73] the Court stated that the thrust of section 703(h) was directed at defining what is or is not an unlawful employment practice, and that section did not bar the remedial award of retroactive seniority to victims of past racial discrimination.[74] *Bowman Transportation* and *Trans World* can be distinguished. In *Bowman Transportation*, the Court held that a collective bargaining agreement could not be used to bar the remedying of the effects of past racial discrimination.[75] In *Trans World*, the alleged discrimination supposedly resulted from the administration and enforcement of the collective bargaining agreement. Thus, the critical distinction lies in the difference between remedying proven illegal discrimination and proving illegal discrimination. In the first case, the illegal employment practice was already established and the Court permitted modification of the collective bargaining agreement to afford relief. In *Trans World*, the refusal to modify the uniform application of the collective bargaining agreement was the alleged illegal employment practice.[76] Therefore, section 703(h) mandates that a bona fide collective bargaining agreement will prevail absent proof of a discriminatory purpose.

The Court also felt that regulating private conduct to the extent of granting religious preferences to some employees was inconsistent with the purposes of title VII. In this regard, the Court emphasized that the "unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. . . ."[77] Truly, this was a recurring theme throughout the majority's opinion. In holding that the seniority system barred accommodation of Hardison's religious beliefs, the Court stated that "to . . . give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."[78] In ad-

72. 42 U.S.C. § 2000e-2(h) (1976).
73. 424 U.S. 747 (1976). *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
74. 424 U.S. at 758.
75. *Id.* at 761-62.
76. 432 U.S. at 82-83 n.13.
77. *Id.* at 81.
78. *Id.*

dition, the Court emphasized that "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that employers must deny the shift and job preferences of some employees, as well as deprive them of their [seniority] rights, in order to accommodate or prefer the religious needs of others. . . ."[79]

By declaring that requiring the employer to bear more than *de minimis* cost in accommodating religious practices is inconsistent with title VII, the Court reaffirmed the principle that granting religious preferences is incompatible with title VII unless such preferences are remedial. Like the abandoning of a valid seniority system, compelling an employer to bear additional costs where such costs are incurred for other employees requesting days off would involve the unequal distribution of employment benefits along religious lines.[80] To require such unequal treatment would conflict with the philosophy of title VII. As the Court stated: "[T]he paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language to the contrary, we will not construe the statute to require an employer to discriminate against some employees to enable others to observe their Sabbath."[81]

Thus, the *Trans World* Court implicitly recognized that the reasonable accommodation requirement is essentially a call for affirmative action relating to religious beliefs. Like an affirmative action program, the obligation to accommodate compels preferential treatment of protected classes without any judicial determination of an illegal employment practice. The Court was in the uncomfortable position of having to choose between narrowly construing the reasonable accommodation rule or mandating religious preferences. The Court chose the path of least resistance: narrow construction. If the rule mandated religious preferences, serious constitutional questions would have been raised.

Reasonable Accommodation and the First Amendment

Religious freedom has been a fundamental theme in American history. Religious persecution by the state and any union of church and state are both repugnant to American beliefs. The first amendment reflects these ideas by providing that: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise

79. *Id.*
80. *Id.* at 84.
81. *Id.* at 85.

thereof. . . ."[82] The prohibition of religious legislation has a dual aspect. The establishment clause forbids compulsion by law of the acceptance of any religion, while the free exercise clause guards against the inhibition of any form of religion. The United States Supreme Court aptly summarized the interrelation between the establishment and free exercise clauses as follows: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority."[83] However, this statement is deceptively simple. For instance, Sunday closing laws are legislation "respecting the establishment of religion" in the sense that religions that observe Sunday as Sabbath will be benefited by such laws. Also, when the state forces a businessman whose Sabbath is Saturday to close on Sunday, the state is arguably burdening that person's free exercise of religion. However, the Supreme Court has upheld Sunday closing laws in the face of such challenges.[84] The free exercise clause and the establishment clause, as indicated in the Sunday closing cases, tend to overlap in some situations.

An inherent tension exists between the two clauses. If a state affirmatively promoted the free exercise of religion, the state, in a sense, would be establishing a religion or at least favoring religion over nonreligion. For example, permitting Bible readings in public schools could be viewed as furthering the free exercise of religion or, instead, as establishing a religion. The Court has disapproved of religious readings in public schools as inconsistent with the establishment clause.[85] Moreover, the Court has held that compulsory public school attendance is violative of the free exercise clause, if the school attendance conflicts with religious beliefs.[86] Thus, the pervasive theme in constitutional jurisprudence involving the religion clauses has been the struggle "to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if extended to a logical extreme, would tend to clash with each other."[87]

In analyzing the interaction between these two clauses, it is important to focus on two policies underlying the first amendment, volunta-

82. U.S. CONST. amend. I.

83. Everson v. Board of Educ., 330 U.S. 1, 15 (1947), *quoting* Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1872).

84. *See, e.g.*, Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

85. Engel v. Vitale, 370 U.S. 421 (1962).

86. Wisconsin v. Yoder, 406 U.S. 205 (1972).

87. Walsh v. Commissioner, 397 U.S. 664, 668-69 (1970).

rism and separatism.[88] The concept of voluntarism is basic to both of the religion clauses.[89] In the free exercise context, voluntarism is furthered by proscribing any degree of compulsion in matters of belief.[90] The establishment clause embodies this principle by insuring that support for religion comes from the voluntary activity of its followers and not from the political support of the state.[91] The ideal of separatism is essentially an establishment clause concept. At the very least, separatism means an institutional separation of church and state.[92] But it also means that the state should not be involved in religious affairs and that sectarian differences should not be allowed to fragment the public by the enactment of nonsecular legislation.[93]

The next section of this note will review the constitutional analysis that has evolved from the establishment clause. Then the question of whether the employer's obligation to accommodate religious practices is inconsistent with the establishment clause will be examined.

The Establishment Clause

The establishment clause of the first amendment has been characterized as the erection of a wall between church and state.[94] Essentially, establishment clause analysis evolved from a theory of separatism;[95] the state and the church should intermingle as little as possible. However, the concept of separatism demands more than an institutional separation of church and state; it also commands that the state should not become involved in religious affairs and that the body politic should not be splintered along religious lines.[96]

The Supreme Court has characterized the language in the establishment clause as "opaque"[97] and has struggled over the years to define the limits of the anti-establishment principle. Although it is difficult to derive an unwavering meaning of the establishment clause, it means at least that government may not prefer one religion over another, or prefer religion over non-religion. In essence, the clause mandates the withdrawal of all state action in the religious sphere, at least

88. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 817-19 (1978) (hereinafter referred to as TRIBE).
89. *Id.*
90. *Id.* at 835-46.
91. *Id.*
92. *Id.*
93. *Id.*
94. Everson v. Board of Educ., 330 U.S. 1, 16 (1947).
95. TRIBE, *supra* note 88, at 818-19.
96. *Id.* at 819.
97. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

to the extent that the free exercise clause does not compel such state action; thus, the clause constructs a barrier between the church and the state. This metaphor is misleading because almost all state action involves some interaction between the religious and the secular. Therefore, the Court has held that when government action touches upon the religious sphere, in order to pass constitutional muster, the law must (1) reflect a clearly secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive entanglement with religion.[98] The following section of this note analyzes this three-part establishment clause test.

The Secular Purpose Requirement

The requirement of a secular purpose is the threshold question in establishment clause analysis. If legislation cannot be justified in secular terms, then the law clearly is inconsistent with the establishment clause. The Court has not found much difficulty in finding a secular purpose in reviewing various laws; it has attached an expansive meaning to the term secular. When a law happens to coincide with the beliefs of one religion, the Court has shown reluctance to invalidate the law if it can discern a secular purpose. Thus, the Court in analyzing Sunday closing laws, said that: "The present . . . effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance of the dominant Christian sects, does not bar the state from achieving its secular goals."[99] Even in the school prayer cases, at least some Justices argued that the requirement of a secular purpose had been satisfied.[100]

The Court has given great deference to the legislative purpose of the statutes and instead has used increased scrutiny in analyzing the effect of the law and whether the law avoids excessive entanglement with religion. For example, in a case involving public aid to religious schools, *Lemon v. Kurtzman*,[101] the Court said that "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else."[102]

98. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). The Court first set forth the tripartite test in this case.

99. McGowan v. Maryland, 366 U.S. 420, 445 (1961).

100. *See* Engel v. Vitale, 370 U.S. 421, 449-50 (1962) (Stewart, J., dissenting); School Dist. v. Schempp, 374 U.S. 203, 212-14, 223, 225 (1963) (Clark, J.).

101. 403 U.S. 602 (1971).

102. *Id.* at 613.

The secular purpose requirement proved controlling in *Epperson v. Arkansas*[103] which involved an establishment clause challenge to a law prohibiting the teaching of evolution in public schools. The Court found no "suggestion . . . [that] the Arkansas' law [could] be justified by considerations of state policy other than [a desire to further] the religious views of some of its citizens."[104] The Court found the absence of any secular purpose controlling: "The overriding fact is that [the law] selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."[105] Therefore, the inquiry into the purpose of the challenged law seems relatively limited. If the Court is able to find any secular purpose, even when the law evolved from other purposes that are arguably nonsecular, the Court will probably rely upon the secular purpose and proceed to the remaining two prongs of the establishment clause analysis.

The Secular Effect Requirement

The requirement that a law have a primary effect that neither advances nor inhibits religion is fundamental to establishment clause analysis.[106] However, the primary effect analysis impliedly raises questions as to when an effect is primary and when it is incidental. For instance, ordinances or laws providing for general municipal services necessarily have the effect of aiding religious institutions. Yet, these laws are not deemed invalid merely because the purely secular effect happens to be realized in a religious context. If the judiciary invalidated such laws because they fortuitously benefit religious activities, the state would be singling out religious activities for hostile treatment in violation of the first amendment. When a specific government program has both religious and secular effects, the judiciary must decide which effect predominates.

The United States Supreme Court has avoided an analysis which would require inquiry into which effect is "primary" and which effect is

103. 393 U.S. 97 (1968).

104. *Id.* at 107.

105. *Id.* at 103. The secular purpose analysis seems to be such a low threshold test that concurring Justice Black found this approach unpersuasive. The Court, Black argued, had chosen to look only at the nonsecular purpose and to ignore the secular purpose of the law. *Id.* at 111-12 (Black, J., concurring).

106. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973).

"secondary."[107] The Court has denied that "such metaphysical distinctions are either possible or necessary."[108] Instead, the Court has substituted an equally metaphysical approach: "Our cases simply do not support the notion that a law found to have a 'primary' effect [that promotes] some legitimate [secular goal] is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion."[109] The nonestablishment analysis focuses on whether the nonsecular effects are indirect or incidental, rather than whether the secular effect is primary.

One commentator persuasively argues that the determination of whether the secular effect predominates hinges on whether the secular impact is *separable* from the religious impact.[110] Even when a government program has a secular purpose and some secular effects, the establishment clause will prohibit the government program when the religious benefits are inseparable from the secular benefits. Under this analysis, the government may not allow Bible readings in public schools because the secular benefit of promoting a broad educational experience is inseparable from the sponsorship of religious activities.[111] *Roemer v. Board of Public Works*[112] illustrates the other end of the separability analysis. That case involved governmental aid to private, religiously-sponsored universities and colleges. The Court held that despite religious sponsorship of the institutions, the schools were not "pervasively sectarian."[113] The Court found that the colleges performed essentially secular functions[114] and that the aid to such institutions did not have the primary effect of advancing religion. The *Roemer* Court concluded that the secular effects obtained were separable from the religious effects due to the essentially nonsectarian nature of the benefited institutions.[115]

Another factor closely related to whether the sectarian effect of a law is separable from the secular effect of a law is the breadth of the class of people benefited by such laws.[116] While the secular and religious effects may be separable, the government program may still be

107. *Id.*
108. *Id.*
109. *Id.*
110. TRIBE, *supra* note 88, at 840.
111. *See* School Dist. v. Schempp, 374 U.S. 203 (1963).
112. 426 U.S. 736 (1976).
113. *Id.* at 755. The colleges received no funds from religious institutions; students were not selected on the basis of religion. *Id.* at 755-59.
114. *Id.* at 755-61.
115. *Id.*
116. TRIBE, *supra* note 88, at 840-45.

unconstitutional because the benefited class is essentially religiously oriented. In *Committee for Public Education & Religious Liberty v. Nyquist*,[117] the narrowness of the benefited class was a key factor in finding the program inconsistent with the establishment clause.[118] The Court struck down a tax relief program for the parents of nonpublic school children where over eighty percent of the benefited class was religiously oriented.[119]

On the other end of the spectrum lies *Walz v. Commissioner*[120] which involved a challenge to tax exemption for religious institutions. In *Walz*, the Court focused on the fact that the state had not singled out religion for preferential treatment but instead had granted religious organizations the same tax status as other non-profit, quasi-public organizations.[121] Thus, if religious organizations are granted benefits only as part of a program that benefits a larger group of organizations, the Court will view the effects as incidental instead of direct.

Perhaps one of the major reasons for inquiry into separability and the breadth of the benefited class is the symbolic impact of government programs. When the secular and nonsecular effects of a government program are inseparable or the class benefited by a program is essentially religiously oriented, the government program symbolically appears to be religious. Such programs erode the underlying policies of the first amendment, that is, separatism and voluntarism.[122] The principle of voluntarism is undermined because the programs portray religion as occupying a preferred status within the state and because any particularly aided religions may appear to be unable to survive without state support.[123] The concept of separatism is violated because the public may perceive such aid as a breach of the "wall" between church and state.[124]

The Requirement of No Excessive Entanglement

The third prong of the anti-establishment analysis, that the government avoid any excessive entanglement with sectarian activity, evolved from the desire to minimize government intrusion into the reli-

117. 413 U.S. 756 (1973).
118. *Id.* at 768.
119. *Id.*
120. 397 U.S. 664 (1970).
121. *Id.* at 673.
122. *See* text accompanying notes 88-93 *supra*.
123. *Id.*
124. *Id.*

gious realm.[125] The anti-entanglement analysis first appeared in *Walz v. Commissioner*.[126] In *Walz*, one of the reasons for upholding a law exempting religious organizations from property taxes was to avoid excessive government entanglement in sectarian affairs.[127] Some members of the Court have criticized the anti-entanglement requirement as merely an element of the secular effect analysis.[128] Proponents of the requirement argue that the secular effect analysis is essentially substantive, while the entanglement analysis focuses on the procedural involvement of a government program in sectarian affairs.[129] Regardless of whether the anti-entanglement analysis is procedural or substantive, it is clear that the analysis reaffirms the principle that the first amendment was intended to inhibit "a union of government and religion that tends to destroy government and degrade religion."[130]

The Supreme Court has recognized two types of prohibited interaction, political entanglement and administrative entanglement.[131] Political entanglement refers to government programs that formulate public decisions along religious lines; the prohibition evolves from the fear of church intrusion into politics.[132] Administrative entanglement focuses directly on the institutional contacts between religion and government; the prohibition reflects the fear that uninhibited government action might intrude into the religious domain.[133]

The concept of administrative entanglement seems applicable in the analysis of religious employment discrimination because any suit brought under title VII necessarily involves an inquiry into whether the alleged discrimination was based on religion. Entanglement of this sort arises in two forms. First is the proscription of excessive government surveillance and evaluation of religious institutions. Thus, for example, in evaluating tax exemptions for religious bodies, the Supreme Court emphasized that eliminating the exemption would lead to "tax valuation of church property, tax liens, tax foreclosures, and direct confrontations and conflicts that follow in the train of those legal processes."[134] While invalidating state salary supplements to teachers in religious schools, the Court noted the difficulty in separating the sec-

125. *Id.*
126. 397 U.S. 664, 674 (1963).
127. *Id.*
128. *See* Roehmer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976).
129. *Id.* at 755.
130. Engel v. Vitale, 370 U.S. 421, 431 (1962).
131. TRIBE, *supra* note 88, at 866.
132. *Id.*
133. *Id.*
134. Walz v. Commissioner, 397 U.S. 664, 674 (1970).

ular and religious aspects of a teacher's style of instruction and that the state would be required to ascertain that "subsidized teachers do not inculcate religion."[135] To enforce this statute, the state would have had to partake in "comprehensive, discriminating, and continuing state surveillance" of the teachers' activities,[136] which would have resulted in "excessive and enduring entanglement between State and Church."[137]

A second form of administrative entanglement involves judicial resolution of internal church disputes[138] and judicial inquiry into whether a claimed belief is religious as opposed to ethical or political. The first case involving judicial resolution of internal church disputes was *Watson v. Jones*.[139] In *Watson*, the Court emphasized that judicial inquiry into matters of religious belief and ritual "would lead to a total subversion of religious bodies, if anyone aggrieved by [a church's internal dispute resolution process] could appeal to a secular court and have them reversed."[140] This analysis reflects the conviction that government must preserve the independence of religious doctrine. Thus, the core of this theory is that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[141]

A leading case in this area is *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.[142] This case arose out of a conflict between the national church and a local congregation. Supporters of the national church contended that the local congregation had departed from established Presbyterian doctrine and that therefore the property belonging to the local congregation should revert to the national body. The Georgia Supreme Court inquired into whether the local congregation had actually departed from established church doctrine. The United States Supreme Court reversed, holding that both the free exercise clause and the establishment clause prohibit this type of inquiry. In this regard, the Court stated:

> [T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. . . . If civil courts undertake to resolve [disputes over church doctrine] in order

135. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).
136. *Id.*
137. *Id.*
138. *See, e.g.*, Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), which is discussed in the text accompanying notes 142-43 *infra*.
139. 80 U.S. (13 Wall.) 679 (1871).
140. *Id.* at 729.
141. *Id.* at 728.
142. 393 U.S. 440 (1969).

> to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . .[143]

Thus, civil courts are prohibited from resolving the underlying dispute over religious doctrine.

Judicial inquiry into whether or not a specific belief is religious is also severly limited. A leading case in this area is *United States v. Ballard*,[144] a mail fraud prosecution where the defendants solicited funds on the representation that they were divine messengers. The Court held that the sincerity, but not the truth, of the defendants' religious beliefs could be analyzed by the fact-finder. Justice Douglas, writing for the Court, carefully circumscribed this inquiry by indicating that no judge or jury had the power or competence to determine whether the claimed religious experience had actually occurred. In this regard, Justice Douglas emphasized that:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men . . . . It embraces the right to maintain theories of life and death which are rank heresy to orthodox faith. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . . The religious views espoused by respondents seem incredible, if not preposterous, to most people. But if these doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake the task, they enter a forbidden domain.[145]

While *Ballard* was decided prior to the Supreme Court's development of the entanglement analysis, inquiry into an individual's religious beliefs seems to violate entanglement principles as much as would an inquiry into a religious institution's doctrine. Unless the Court is able to distinguish between religious institutions and religious individuals, a distinction that seems clearly inconsistent with the first amendment, the *Ballard* decision is applicable to the administrative entanglement analysis. This second form of administrative entanglement involving inquiry into an individual's religious beliefs is directly applicable in religious discrimination claims. *Ballard* indicates that the trier of fact can only look to whether the belief in question is sincerely held.

A similar approach was used in the conscientious objector cases,

143. *Id.* at 449.
144. 322 U.S. 78 (1944).
145. *Id.* at 86-87.

Welsh v. United States[146] and *United States v. Seeger*.[147] In *Welsh*, the Court stated that the "task is to decide whether the beliefs professed by a [religious practitioner] are sincerely held and whether they are, *in his own scheme of things*, religious."[148] The *Welsh* case suggests a two-pronged inquiry: (1) whether the belief is sincerely held and (2) whether the belief, judged by the claimant's own standards, is religious.[149] However, even this inquiry should be carefully limited. For example, an inquiry into sincerity necessarily involves the fact-finder's use of a reasonableness standard, because the more reasonable a belief appears, the more likely it will be accepted as sincerely held. The ultimate inquiry should really be an inquiry into the employee's subjective beliefs. But to the extent that the entanglement analysis insures religious liberty by prohibiting judicial involvement with religious doctrine, civil courts must play a limited role in analyzing claimed religious beliefs. Thus, the administrative entanglement principle does not prohibit adjudication of religious discrimination claims, but it does circumscribe the court's role in such cases.

CONSTITUTIONAL CHALLENGES TO THE REASONABLE ACCOMMODATION RULE

The constitutionality of the reasonable accommodation rule has been questioned in several cases. In *Cummins v. Parker Seal Co.*,[150] the United States Court of Appeals for the Sixth Circuit upheld the rule as constitutional. On the other hand, the United States District Court for the Central District of California in *Yott v. North American Rockwell Corp.*,[151] and the United States District Court for the Western District of Pennsylvania in *Gavin v. Peoples Natural Gas Co.*,[152] found the reasonable accommodation rule unconstitutional. This note will now analyze and compare the approaches of these courts.

146. 398 U.S. 333 (1970).

147. 380 U.S. 163 (1965).

148. 398 U.S. at 339, *quoting* United States v. Seeger, 380 U.S. 163, 185 (1965).

149. While this approach arose in a different definitional context, the EEOC appears to have adopted the *Welsh* approach by looking to whether the beliefs are "as deeply and sincerely held as more conventional religious convictions." EEOC Dec. 71-779, 3 FEP 172, 173 (1970). *But see* Yott v. North Am. Rockwell Corp., 501 F.2d 398, 400 (9th Cir. 1974) where the court stated in dicta that the conscientious objector approach was not similar.

150. 516 F.2d 544 (6th Cir. 1975).

151. 428 F. Supp. 763 (C.D. Cal.) (1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979). The United States Court of Appeals for the Ninth Circuit affirmed the district court's holding as to the scope of the employer's duty to accommodate. Thus, the Ninth Circuit had no reason to confront the constitutional issue. *Id.* at 909.

152. 18 FEP 1431 (W.D. Pa. 1979).

Cummins v. Parker Seal Co.

As previously discussed, *Parker Seal* involved a religious discrimination claim by a Sabbath observer.[153] Because the United States Court of Appeals for the Sixth Circuit found that the employer had not fulfilled its duty to accommodate, the court was obliged to confront the claim that the rule was unconstitutional. The court applied the secular purpose, secular effect, and entanglement analysis emanating from the establishment clause.[154]

The Sixth Circuit advanced two reasons for sustaining the rule under the secular purpose analysis. First, the rule was developed "to put teeth in the existing prohibition of religious discrimination."[155] Second, the court reasoned that "the reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for supremacy of conscience."[156] The majority of the court supported this analysis by an analogy with *Gillette v. United States*,[157] a Supreme Court case concerning an establishment clause challenge to a draft exemption statute. The *Gillette* Court had found that the exemption for conscientious objectors evolved from a valid secular purpose because the exemption resulted from the pragmatic concern that it would be difficult to convert conscientious objectors into fighting men. The Court concluded that it was permissible for Congress to avoid "clashes with the dictates of conscience" by promoting free exercise values.[158] The *Parker Seal* court's reliance on *Gillette* seems inappropriate. In the draft cases, because the religious exemption was arguably compelled by the free exercise clause, the *Gillette* Court was forced to tread that thin line between free exercise and anti-establishment values. Recognizing this inherent tension, the Court upheld the draft exemption. The reasonable accommodation rule, on the other hand, is not compelled by the free exercise clause due to the absence of state action.[159] Thus, the tension between the two religion

153. 516 F.2d 544 (6th Cir. 1975).
154. *Id.* at 551-52.
155. *Id.* at 552.
156. *Id.*
157. 401 U.S. 437 (1971).
158. *Id.* at 453.
159. The first amendment provides that "Congress shall make no law . . ." inhibiting or promoting religion. U.S. CONST. amend. I. Thus, by its own terms, the first amendment speaks only to congressional action. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the first amendment was held to be incorporated through the fourteenth amendment as fundamental to our concept of liberty. The fourteenth amendment relates only to state action by providing that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST.

clauses is not inherently present. In this way, the court's analogy seems inappropriate.

The *Parker Seal* court also upheld the reasonable accommodation rule under the secular effect analysis. The court noted that the establishment clause only prohibits laws that directly advance or inhibit religion, not laws that confer incidental benefits on religion.[160] Thus, the court concluded that the effect of the accommodation requirement was to "inhibit discrimination, not to advance religion."[161] The court also noted that the rule "mandate[s] no financial support, direct or indirect, for religious institutions, a factor [the court found] significant in view of the traditional characterization of such governmental aid as one of the primary evils against which the establishment clause protects."[162]

The court's analysis in this respect seems somewhat simplistic. It is true that the establishment clause prohibits financial aid to religious institutions, but its values extend beyond outright financial aid to religious organizations. For example, the establishment clause has been held to prohibit individualized salary supplements to parochial school teachers because of the concern that such aid would advance religion.[163] In addition, the primary effect analysis is not limited to financial aid alone. The Supreme Court, in *Engle v. Vitale*,[164] invalidated a public school prayer program under the establishment clause. In this way, the establishment clause prohibits many kinds of government assistance to religion.

The *Parker Seal* court also found the accommodation rule consistent with anti-entanglement principles.[165] Noting that the reasonable accommodation rule will not involve continuous contacts between a religious organization or individual and the state, and that the inquiry in a religious discrimination case is no more exacting than the determination of whether a religious organization qualifies for a tax exemption, the court saw no violation of entanglement principles.

The dissent in *Parker Seal* criticizes the majority's analysis for failing to grasp the fact that "if Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby empow-

amend. XIV. Accordingly, purely private activity such as religious discrimination by private employers cannot contravene the first amendment. *See generally* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

160. 516 F.2d at 553.

161. *Id.*

162. *Id.*

163. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

164. 370 U.S. 421 (1962).

165. 516 F.2d at 553-54.

ered to breach it to take away religious freedoms."[166] The dissent found that the reasonable accommodation rule was not justified by a valid secular purpose. Citing Senator Randolf, the author of the reasonable accommodation amendment to title VII,[167] the dissent argued that the purpose behind the rule is the "promotion of certain religions whose followers' practices conflict with employers' schedules."[168]

The dissent also found the rule inconsistent with the secular effect requirement. Arguing that the reasonable accommodation rule discriminates between religion and nonreligion, the dissent reasoned that other employees would be forced to bear the burden caused by the employers' accommodation of religious practitioners.[169] Also, the dissent argued that the rule discriminates among religions because:

> [O]nly those [religions] which require their followers to manifest their beliefs in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employer's accommodation. By singling out particular sects for government protection, the Federal Government has forfeited the pretense that the rule is merely part of a general ban on religious discrimination.[170]

The dissent saw no need to analyze the rule under entanglement principles because the rule was inconsistent with the establishment clause in both purpose and effect.[171]

Yott v. North American Rockwell Corp.

Yott v. North American Rockwell Corp.[172] involved a religious discrimination claim against an employer and union. The employee claimed that his religious convictions prohibited his compliance with the collective bargaining agreement; he refused to pay union dues.[173] He suggested the following accommodations: (1) that he be given a job outside the bargaining unit; (2) that he be exempted from union security provision; or (3) that he be reinstated in his old job at a lower pay rate, presumably to pay union dues from that difference.[174] The defendants challenged such accommodations because they would be illegal or, even if they were legal, they would be only temporary because

166. *Id.* at 554-55 (Celebrezze, J., dissenting).
167. *See* text accompanying notes 32-35 *supra*.
168. 516 F.2d at 558 (Celebrezze, J., dissenting).
169. *Id.*
170. *Id.*
171. *Id.*
172. 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979).
173. The agreement provided that the employee must join the union and pay union dues in order to retain employment. 428 F. Supp. at 764.
174. *Id.* at 765.

of further union organizing efforts.[175] Also, the defendants challenged the reasonable accommodation rule on constitutional grounds.[176] The United States District Court for the Central District of California refused to order such accommodation and also addressed the constitutional issue.

The *Yott* court's analysis of the constitutional issue focused on the scope of the employer's duty to accommodate. The court concluded that applying the reasonable accommodation rule would require employers to treat employees unequally on the basis of their religion.[177] The court then emphasized that governmental neutrality is the cornerstone of first amendment values.[178] When Congress decided that otherwise nondiscriminatory conduct should be modified to conform to religious beliefs, it had breached this neutrality principle.[179] The reasonable accommodation rule was inconsistent with the first amendment.[180]

While the district court's analysis could have been more extensive, the court expressed the same concerns that troubled the *Trans World* Court and the dissent in *Parker Seal*. While title VII originally banned the use of certain criteria as factors in employment decision-making, the reasonable accommodation rule conflicts with this concept by commanding that preferences be distributed on the basis of one of those same criteria. The *Yott* court went further than the majority in *Trans World* by acknowledging that such religious preferences are not only inconsistent with the title VII antidiscrimination mandate,[181] but that such conduct is also inconsistent with the Constitution.

Gavin v. Peoples Natural Gas Co.

In *Gavin v. Peoples Natural Gas Co.*,[182] plaintiff, a Jehovah's Witness, was employed as a service operator at defendant's company. One of his job assignments was raising and lowering the American flag. Plaintiff refused to do so, asserting that this act conflicted with his religious beliefs. When he was discharged for this refusal, he brought a

175. *Id.*
176. *Id.*
177. *Id.* at 766.
178. *Id.* at 767.
179. *Id.*
180. The United States Court of Appeals for the Ninth Circuit affirmed the district court's holding as to the scope of the employer's duty to accommodate. Thus, the Ninth Circuit had no reason to confront the constitutional issue. 602 F.2d at 909.
181. 428 F. Supp. at 766.
182. 18 FEP 1431 (W.D. Pa. 1978).

religious discrimination action. The company alleged that the reasonable accommodation rule violated the Constitution. The United States District Court for the Western District of Pennsylvania sustained this allegation and dismissed Gavin's complaint.

The *Gavin* court analyzed the case under the tripartite establishment clause standards. The court recognized that good arguments could be made on both sides of the secular purpose analysis. First, the court looked to the legislative history of the reasonable accommodation rule. The court concluded that the remarks of Senator Randolf, who introduced the amendment, arguably indicated that the rule was motivated by "sectarian impulses."[183] On the other hand, the court noted that the reasonable accommodation rule could be justified in light of the larger purposes of title VII, the prevention of discrimination in employment.[184]

Under the secular effect analysis, the *Gavin* court acknowledged that religion in general and particularly the adherents of certain faiths derived some benefits from the rule.[185] The court then considered whether that effect was primary or merely incidental.[186] While the court did not actually decide this issue, it recognized that the company had raised substantial constitutional questions.[187]

The court addressed the entanglement issues raised by the employee's complaint. The court had considerable difficulty with this issue and concluded that it could not constitutionally adjudicate the employee's claim. First, the court discussed the differences between claims based on religious discrimination and claims arising from the use of other impermissible criteria, such as sex or race. The court noted that racial and sexual discrimination were banned by title VII in part because " 'they are immutable characteristics determined by accidents of birth' and 'traits for which the individuals bear no responsibility.' "[188] In contrast, the court emphasized that religions, or religious beliefs, are not so easily defined or determined. The court explained that to adjudicate the religious discrimination claim, it would be forced to determine whether the alleged religious belief was bona fide.[189] To do this, the court concluded, would require the admission and evalua-

183. *Id.* at 1435.
184. *Id.* at 1436.
185. *Id.* at 1436-37.
186. *Id.* at 1437.
187. *Id.*
188. *Id.* at 1438, *quoting* Novotny v. Great Am. Fed. Sav., 584 F.2d 1235, 1243 (3d Cir. 1978), *vacated and remanded sub nom.* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979).
189. 18 FEP at 1438.

tion of expert testimony from adherents of the employee's particular religious sect. The *Gavin* court concluded that such an inquiry was inconsistent with the establishment clause.[190]

The court also analyzed two possible avenues to avoid this problem, but concluded that the result of the case would be no different. First, the term religion could be defined so as to include anything an employee believes to be religious.[191] The court objected to such an expansive definition of religion because it would create havoc in the workplace. Additionally, "such a reading [could] create due process problems for employers who would have no way of implementing such a broad and vague scheme wherein they [are] charged with an affirmative duty to accommodate."[192] The second avenue would be to decide that the employee's belief was not religious as a matter of law.[193] However, the court believed that this determination would require interpreting the statute to protect only common religious beliefs and such a narrow interpretation would raise serious establishment clause objections.[194] Apparently feeling that a district court was not the proper forum for resolution, the court dismissed the complaint and suggested that these doctrinally difficult issues are more appropriately reviewed in an appellate court.[195] In so holding, the court recognized serious constitutional challenges under the purpose and effect prongs of the establishment clause analysis. However, the anti-entanglement prong proved to be the more difficult issue. The court, faced with the issue of whether or not a belief is religious, refused to decide the issue because of the serious constitutional issues inherent in such a determination.

Summary of Judicial Opinions of the Constitutionality of the Reasonable Accommodation Rule

These three cases represent the divergent views taken by the courts. The *Parker Seal* majority had no problems in holding the reasonable accommodation rule consistent with the establishment clause. The dissent, however, found the rule inconsistent with the establishment clause in both purpose and effect. The *Yott* court, on the other hand, did not even apply the tripartite standards of the establishment clause, but instead focused on the neutrality principal underlying the

190. *Id.* at 1439.
191. *Id.* This is essentially the same approach used in the conscientious objector cases. *See* text accompanying notes 146-49 *supra*.
192. 18 FEP at 1439.
193. *Id.*
194. *Id.*
195. *Id.*

first amendment. According to *Yott*, Congress breached this neutrality principle by enacting the reasonable accommodation rule. The *Gavin* court, like the *Parker Seal* court, applied the establishment clause standards, but it reached an opposite result. The *Gavin* decision saw the reasonable accommodation rule as arguably violative of the establishment clause in purpose and effect, but seemed to show most concern over the entanglement prong of the test. Thus, the *Gavin* court held that it was constitutionally impermissible to adjudicate the religious discrimination claim.

ANALYSIS OF THE PURPOSE OF THE REASONABLE ACCOMMODATION RULE

The legislative history of the reasonable accommodation rule clearly shows that the rule evolved from sectarian motives. Senator Randolf, the bill's sponsor, explained that the rule was intended to help prevent the dwindling memberships of some religions allegedly due to religious conflicts in the employment area and that religious liberty as guaranteed by the first amendment should be given some meaning in the employment context.[196] Clearly, these goals seem nonsecular. As noted in the *Parker Seal*[197] decision, the reasonable accommodation rule's purpose may also be justified by looking to the policies supporting title VII. The reasonable accommodation rule may be viewed as a device necessary for achieving the broad goals of title VII. As noted by the *Gavin*[198] court, both of these arguments seem plausible. Thus, the reasonable accommodation rule arguably is supported by two purposes, one secular and one nonsecular.

The first prong of the establishment clause analysis requires that a law have a valid secular purpose. The current analysis of the secular purpose seems to be a low threshold test.[199] Thus, if the court is able to find *any* valid secular purpose, then the law will probably withstand the first prong of the establishment clause test.[200] The reasonable accommodation rule evolved from two purposes, the secular purpose in furthering nondiscrimination on a religious basis and the nonsecular goal of furthering the practice of religion. Under the low level of inquiry involved in the secular purpose analysis, the reasonable accommodation rule is consistent with the establishment clause. When faced

196. *See* text accompanying notes 32-35 *supra*.
197. *See* text accompanying notes 150-65 *supra*.
198. *See* text accompanying notes 182-95 *supra*.
199. *See* text accompanying notes 99-105 *supra*.
200. *Id.*

with a choice between two competing purposes, one secular and the other nonsecular, the secular purpose alone will justify the reasonable accommodation rule.

Analysis of the Reasonable Accommodation Rule and the Requirements of No Excessive Entanglements

The *Gavin* court found that anti-entanglement principles prohibited the adjudication of an employee's religious discrimination claim.[201] However, this holding is probably not commanded by the requirement that government avoid excessive entanglement. The anti-entanglement principle merely limits the scope of judicial inquiry into a claimed religious belief. It requires that a court focus on the claimant's sincerity in claiming to possess a belief which is religious in the individual's own scheme of things. Courts, however, have tended to focus on the sincerity of the religious belief. In *Hansard v. Jones-Manville Products Corp.*,[202] plaintiff allegedly had held a lifelong conviction against Sunday work, yet accepted a job that required Sunday work. He worked on Sundays until shortly before his discharge. The court concluded that he had not demonstrated the "requisite sincerity of religious convictions."[203] However, in *Kettel v. Johnson & Johnson*,[204] the plaintiff's conviction against Saturday work was held sincere although he had been a member of the same church, with the same Sabbath doctrine, for several years before he made a "New Year's resolution" against Sunday work.[205] Thus, courts have not seemed to accept the dual analysis enunciated in the *Welsh-Seeger* conscientious objector cases,[206] but instead have focused on the element of sincerity.

The anti-entanglement principles of the establishment clause would probably permit analysis of whether a belief, in the plaintiff's own scheme of things, is religious. However, a more exacting inquiry into the truth or falsity of the belief would clearly be inconsistent with the establishment clause.[207] Thus, the anti-entanglement requirement circumscribes the employer's ability to challenge the employee's claim. The net effect of this is to expand the class of possible claims of employees who may argue that their conduct is religiously motivated.

201. *See* text accompanying notes 182-95 *supra*.
202. 5 FEP 707 (E.D. Tex. 1973).
203. *Id.* at 708.
204. 337 F. Supp. 892 (E.D. Ark. 1972).
205. *Id.* at 893.
206. *See* text accompanying notes 146-49 *supra*.
207. *Id.*

Gavin recognized this dilemma.[208] However, this possibility alone does not render the reasonable accommodation rule inconsistent with the requirement of no excessive entanglement.

THE REQUIREMENT OF A SECULAR EFFECT AND THE REASONABLE ACCOMMODATION RULE

The threshold question under this analysis is what is the effect of the reasonable accommodation requirement. First, the rule has the effect of treating the failure to accommodate as equivalent to religious discrimination.[209] Unlike discrimination by disparate impact,[210] the reasonable accommodation rule places the burden on the employer to show that no accommodation is possible without undue hardship. Thus, the burden on the plaintiff to set out a prima facie case for religious discrimination is decreased. The other effects of the rule may be explained by examining the class of plaintiffs who benefit by the rule.

First, the rule benefits religious practitioners. More specifically, the rule only benefits those religious practitioners whose specific religion requires adherence to some particular doctrine or practice which needs accommodation. Second, the rule benefits society in general by prohibiting religious discrimination in the employment context. This is supported by the fact that religious discrimination was prohibited in title VII's original statutory scheme.[211] To the extent that the reasonable accommodation rule facilitates title VII's goals, the rule works a benefit to society. Another effect may be derived by examining the differences between the reasonable accommodation rule and the original ban on religious discrimination. To some extent, this analysis is speculative because the reasonable accommodation rule arose early in title VII's history through EEOC guidelines on religious discrimination.[212] An inquiry into the treatment of other forms of discrimination is helpful. Title VII, as announced in *Griggs v. Duke Power Co.*,[213] can be violated by facially neutral employment policies that nevertheless result in a disparate impact among certain classes.[214] If disparate impact is shown, the employer may justify its neutral employment policy by a showing of business necessity. The reasonable accommodation rule also proscribes neutral employment policies that have a disparate im-

208. *See* text accompanying notes 182-95 *supra*.
209. Trans World Airlines v. Hardison, 432 U.S. 63 (1977).
210. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
211. *See* text accompanying notes 4-7 *supra*.
212. *See* text accompanying notes 16-24 *supra*.
213. 401 U.S. 424 (1971).
214. *Id.* at 430.

pact. However, under the reasonable accommodation rule, the policy may only be justified by a showing that accommodation would result in undue hardship.

The touchstone of business necessity is whether the rule is somehow related to job performance.[215] Thus, if a religious practitioner refused to work on Saturdays, his Sabbath, then an employer's rule requiring Saturday work would be justified by a business necessity because the rule is reasonably related to job performance.

Whether the same rule would be justified under the undue hardship test is not entirely clear. Under a *Trans World* analysis,[216] to the extent that such accommodation would require a breach of a seniority system or would result in more than *de minimis* costs, no accommodation would be required. However, absent these factors, the employer would be required to grant employment preferences on a religious basis. In this way, the reasonable accommodation rule goes beyond a typical disparate impact analysis.

Thus, the effects of the reasonable accommodation rule may be summarized as follows: it equates the failure to accommodate with religious discrimination and thus requires preferential treatment without a prior finding of discrimination; and it benefits religious employees, as opposed to the nonreligious or those whose religions do not conflict with the employer's rules.

Applying these effects to the secular effect analysis requires an inquiry into both the separability of the secular and nonsecular effects and the breadth of the benefited class.[217] The first effect, that of equating failure to accommodate with religious discrimination, seems clearly nonsecular. It goes beyond merely preventing discrimination, but instead places an affirmative obligation upon employers. In the area of race or sexual discrimination, an employer must only grant preferential treatment to remedy a judicially-found history of discrimination. The reasonable accommodation rule, on the other hand, requires preferential treatment prior to any judicial finding of discrimination. The net effect of the rule is to place the remedy before the determination of any illegal conduct.

The second effect seems clearly secular. While it is true that only religious practitioners or religious practitioners whose jobs conflict with work schedules benefit from the rule, these effects are no different than

215. *Id.* at 431.
216. *See* text accompanying notes 51-81 *supra*.
217. *Id.*

the original ban on religious discrimination contained in title VII. To the extent that the original ban on religious discrimination was secular in effect, so is the reasonable accommodation rule. In essence, this is a restatement of the proposition that the reasonable accommodation rule facilitates title VII's ban on religious discrimination.

These effects are not sufficiently separable to be consistent with the secular effect of the establishment clause analysis. An analogy to the school prayer cases may be helpful. There, the effects of promoting a broad educational experience and promoting religions were inseparable and thus the program violated the establishment clause. In essence, the two effects merged into one. The same is true of the reasonable accommodation rule. The reasonable accommodation rule facilitates title VII's ban on religious discrimination, but it does so by requiring, at least in some cases, preferential treatment on a religious basis. The secular and nonsecular effects of the rule merge. Thus, the rule is inconsistent with the first prong of the secular effect analysis.

The breadth of the benefited class bolsters the argument that the reasonable accommodation rule is inconsistent with the establishment clause. The rule does not benefit merely religious practitioners but only those religious practitioners whose beliefs clash with neutral work policies. As the dissent pointed out in *Parker Seal*, the reasonable accommodation rule discriminates among religions.[218] The benefited class is not all religious practitioners, but merely a sub-class of that class. Unlike *Walz v. Commissioner*, where the benefited class included religious and nonreligious organizations,[219] the reasonable accommodation rule benefits a very narrow class. The symbolic effect of the rule is that a specific religious group is being singled out for special treatment. The *Parker Seal* case illustrates this perception. There, the employee was fired, not so much for his refusal to work on his Sabbath, but because the employer's initial accommodation of his refusal led to dissension among his fellow employees.[220]

Thus, the reasonable accommodation rule conflicts with the first amendment. It undermines the concept of voluntarism by creating the appearance that the specific religions benefited by the rule are unable to stand on their own merits. It conflicts with the concept of separatism by creating the appearance that the benefited religions are being aided

218. 516 F.2d at 558 (Celebrezze, J., dissenting).
219. *See* text accompanying notes 120-21 *supra*.
220. *See* text accompanying notes 45-50 *supra*.

by the government. Therefore, the reasonable accommodation rule violates the establishment clause.

CONCLUSION

This note has discussed the evolution of title VII's ban on religious discrimination. Title VII's original ban on religious discrimination surely promoted religious liberty in the United States. Title VII gave some meaning to the idea of the free exercise of religion in the context of private activities. However, by subsequently adding the reasonable accommodation rule, Congress went beyond merely prohibiting religious discrimination. Instead, Congress mandated unequal treatment on a religious basis. By so doing, Congress not only extended the scope of title VII, but it also blurred the separation between church and state.

Under the secular purpose analysis of the establishment clause, the law is valid. While the law arguably evolved from sectarian impulses, the reasonable accommodation rule can be justified as a means necessary to facilitate the broad purpose of title VII, that is, the prevention of discrimination in employment. The reasonable accommodation rule also does not violate the anti-entanglement prong of the establishment clause. Instead, the anti-entanglement principle merely circumscribes judicial inquiry into the truth or falsity of a religious belief. However, under the secular effect analysis, the reasonable accommodation rule violates the establishment clause. First, the secular effect of preventing discrimination and the nonsecular effect promoting religious activity are inseparable. Second, the class benefited by the law is limited to that class of religious employees whose beliefs are inconsistent with otherwise neutral work policies. The reasonable accommodation rule discriminates both between religion and nonreligion and among specific religions. Thus, the law contravenes the establishment clause. If Congress has the power to promote religious liberty in this way, then the converse is also true and Congress would have the power to suppress religious liberties. Such is not the case and the reasonable accommodation rule is an impermissible intrusion by government into the religious sphere.

JAMES L. BEARD